



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 3, 1993

Mr. Gilbert D. Douglas
Senior Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR93-052

Dear Mr. Douglas:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 17620.

The Houston-Harris County Area Agency on Aging (the "agency") has received a request for all information relating to Neighborhood Centers, Inc. ("NCI"). Specifically, the requestor seeks eight categories of information, including:

1. All contracts with NCI Inc. since January 1, 1990.
2. All monitoring reports, inspections, audits of NCI by the City of Houston, Harris County or any other governmental agency since January 1, 1990.
3. All internal memorandum since January 1, 1990.
4. All documents detailing payments to NCI since January 1, 1990.
5. All submissions from NCI relating to meals served at NCI senior citizen centers throughout Harris County since January 1, 1990. Documents should include names of recipients and addresses and all master lists of NCI clients in possession of the City of Houston. Submissions should be divided by center.
6. All other client submissions from NCI since January 1, 1990 relating to services.

7. All internal memorandum relating to contractual performance of NCI since January 1, 1990.

8. All correspondence between the NCI personnel and any personnel of the Department of Aging.

You advise us that some of the requested information will be made available to the requestor, including categories 1, 4, and 7 in their entirety and portions of the remaining categories. You further advise us that some of the requested information is not in the city's possession. The Open Records Act does not require a governmental body to obtain information not in its possession. Open Records Decision No. 558 (1990). You seek clarification from the requestor regarding categories 5 and 8. You object to release of the requested information only to the extent that it reveals the names and addresses of NCI participants. You claim that this information is excepted from required public disclosure by section 3(a)(1) of the Open Records Act and by the informer's privilege.

Section 3(a)(1) of the Open Records Act excepts from required public disclosure "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." The requirement of confidentiality must be explicit in a statutory provision in order to fall within section 3(a)(1). See Open Records Decision No. 465 (1987). Confidentiality provisions of federal statutes and regulations also fall within section 3(a)(1). See Open Records Decision No. 561 (1990). However, absent specific statutory authority, a governmental body may not promulgate a rule designating information as confidential to bring it within section 3(a)(1). Open Records Decision No. 484 (1987).

You claim that some of the requested information is excepted from required public disclosure by section 3(a)(1) in conjunction with Texas regulations mandated by title 45, section 1321.51 of the Code of Federal Regulations. Section 1321.51 provides, in pertinent part:

(a) A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an older person, or obtained from an older person by a service provider or the State or area agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies.

45 C.F.R. § 1321.51. Section 1321 applies to state agencies that receive federal grants for providing services under title III of the Older Americans Act, 42 U.S.C. § 3001 *et seq.*; 45 C.F.R. § 1321.1; Hum. Res. Code ch. 101 (Texas Department on Aging). Pursuant to

this requirement, the Texas Department on Aging has enacted title 40, section 267.8 of the Texas Administrative Code, which provides, in pertinent part:

(d) Participant intake, assessment, and reassessment procedures. The service provider agency will maintain official files containing information which identifies regular participants, documents eligibility, and gives procedures for emergency care.

(1) Participant files should contain the date that each participant is provided oral or written procedures for contributions and for complaints.

(2) Participant files for home-delivered meal applicants should contain documentation of assessment visits which include reason for homeboundness and any resources, such as family, friends, and neighbors. The date of each assessment and reassessment visit and the name of the individual doing the assessment will be recorded. The dates of initiation and termination of meal delivery and the name of the individual authorizing them will be recorded. If an application for service is denied, the reasons will be recorded with the name of the responsible individual.

(3) The confidentiality of such files will be protected.

40 T.A.C. § 267.8;¹ *see also* Human Resources Code §§ 101.021 (authorizing Texas Department on Aging to promulgate rules), 101.025 (defining relationship between Texas Department on Aging and federal, state, and local agencies).

We understand that the agency receives federal funds under title III of the Older Americans Act and is designated as an area agency by the Texas Department on Aging pursuant to section 1321.33 of the federal regulations. Accordingly, we conclude that the agency is subject to the foregoing regulations. We conclude that the requested information must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act in conjunction with the foregoing regulations to the extent that such information reveals the names of NCI participants and their identification numbers or identifies or tends to identify NCI participants.²

¹Sections 267.1-267.12 became effective on October 9, 1987. They were enacted under the general authority of the Texas Department on Aging set forth in chapter 101 of the Texas Human Resources Code. These regulations are required by the Older Americans Act, titles III C1 and C2, and the Omnibus Hunger Act of 1985. Tex. Dep't on Aging, 12 Tex. Reg. 3378 (1987).

²While section 1321.51 mandates promulgation of state regulations excepting information identifying or tending to identify participants in nutrition service programs from public disclosure, it does not mandate regulations with the broad scope of title 40 of the Texas Administrative Code, section

You also claim that some of the information is protected from required public disclosure by the informer's privilege, as incorporated into the Open Records Act by section 3(a)(1). Open Records Decision No. 549 (1990) at 4-5. The informer's privilege applies when a person reports violations of the law to officials having a duty to enforce the law. Open Records Decision No. 515 (1988) at 2. The informer's privilege serves to encourage the flow of information to the government by protecting the identity of the informer. *Id.* If the contents of the informer's statement would tend to reveal the identity of the informer, the privilege protects the statement itself to the extent necessary to preserve the informer's anonymity. *Id.* The basis for the informer's privilege is to protect informers from the fear of retaliation and thus encourage them to cooperate with law enforcement efforts. *Id.* The informer's privilege under section 3(a)(1) is applicable not only to law enforcement agencies, but also to "administrative officials having a duty of inspection or of law enforcement within their particular spheres". Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961) and cases cited therein); *see also* Attorney General Opinion MW-575 (1982) at 2.

The information you seek to protect under the informer's privilege relates to alleged misappropriation of certain foods in violation of title 40 of the Texas Administrative Code, section 267.3. Generally, chapter 267 governs standards for nutrition services provided under title III of the Older Americans Act. Section 267.3(c)(2) provides:

Foods served to the participant as part of the meal that may be taken from site are cake, cookies, breads, rolls, and fresh fruit. These foods, other than whole citrus fruits, and bananas, will be wrapped before being taken. Entrees, vegetables, canned fruit, milk, margarine, or butter will not be taken from the site by the participant.

40 T.A.C. § 267.3. You have not cited any statute or regulation making the taking of food from a site contrary to section 267.3 a civil or criminal offense. We note as well that the communication for which you seek protection under the informer's privilege does not appear to identify the informants. Accordingly, we conclude that the informer's privilege may not be properly invoked here. The information for which you seek informer's privilege protection may not be withheld under section 3(a)(1) of the Open Records Act and must be released.

Finally, we note that some of the requested information is protected from required public disclosure by common-law privacy. Section 3(a)(1) excepts information from required public disclosure if its release would cause an invasion of privacy under the test

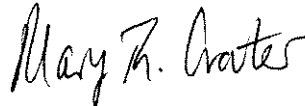
(footnotes continued)

267.8(d). Therefore, we do not believe that the Texas regulations can be construed to broadly prohibit the release of all information. *See* Open Records Decision No. 484 (1987).

articulated by the Texas Supreme Court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. For your convenience, we have marked the information that we conclude is highly intimate or embarrassing and is of no legitimate concern to the public. This information must be withheld from required public disclosure under section 3(a)(1) of the Open Records Act. The remaining information must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-052.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/GCK/mc

Ref.: ID# 17620
ID# 17665
ID# 17716

cc: Mr. Wayne Dolcefino
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